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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RALPH DURAN, MICHAEL ESPARZA,

Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF
FORESTRY AND FIRE PROTECTION; JOE
TYLER in his official capacity as Director of
the California Department of Forestry and Fire
Protection; CALIFORNIA DEPARTMENT
OF HUMAN RESOURCES; ERAINA
ORTEGA in her official capacity as Director
of the California Department of Human
Resources; and DOES and DOE ENTITIES 1-
20; inclusive,

Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
RELIEF AND INJUNCTIVE RELIEF:**

**(1) VIOLATIONS OF 42 U.S.C. SECTION
12112(D) [EMPLOYMENT
DISCRIMINATION REGARDING
MEDICAL EXAMINATIONS AND
INQUIRIES];**

**(2) VIOLATIONS OF 42 U.S.C. SECTION
2000FF-1 [EMPLOYMENT
DISCRIMINATION BASED ON
GENETIC INFORMATION];**

**(3) VIOLATIONS OF 42 U.S.C. SECTION
2000FF-5 [EMPLOYMENT
DISCRIMINATION REGARDING
CONFIDENTIALITY OF GENETIC
INFORMATION];**

**(4) VIOLATIONS OF ARTICLE I,
SECTION 1 OF THE CALIFORNIA
CONSTITUTION [RIGHT TO PRIVACY];**

**(5) VIOLATIONS OF THE FOURTH
AMENDMENT OF THE U.S.
CONSTITUTION [RIGHT TO PRIVACY];**

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**(6) VIOLATIONS OF THE FIFTH
AMENDMENT OF THE U.S.
CONSTITUTION [RIGHT TO PRIVACY];
AND**

**(7) VIOLATIONS OF THE
FOURTEENTH AMENDMENT OF THE
U.S. CONSTITUTION [RIGHT TO
PRIVACY]**

1 operated CAL FIRE's Mandatory Testing program. Color's testing program involves using a nasal
2 swab to collect a biological sample from an employee to test for COVID-19. Before this happens,
3 however, the employee—whether he or she is testing voluntarily or involuntarily per CAL FIRE's
4 rules— must register for the test through an electronic process where he or she must provide
5 personal information and agree to Color's privacy policies and terms of service. Color will not
6 allow an employee to skip this registration requirement. Thus, if the registrant refuses to provide
7 responses to the registration's questionnaire or consent to Color's policies, Color will bar them
8 from testing. This means that by requiring certain employees to undergo testing, under the threat
9 of possible termination, CAL FIRE is forcing them to complete Color's registration process.

10 5. Color requires CAL FIRE employees to provide confidential, personal information
11 in answering questions during the registration process, in submitting biological samples as part of
12 the nasal swab test, and in relinquishing control of information produced as a result of the test.
13 Color also requires these employees to expansively waive their privacy rights with respect to all of
14 this information, thereby permitting Color to disclose confidential information to unknown,
15 vaguely described third parties without advance notice to, or specific consent from, the employee.
16 Because these privacy waivers are framed in broad language, Color has wide discretion to disclose
17 this information to any number of third parties.

18 6. By requiring employees to undergo COVID-19 testing using their agent, Color,
19 which in turn requires employees to "consent" to broad privacy waivers before being permitted to
20 utilize Color's COVID-19 testing services, Defendants CAL FIRE and CalHR, as well as
21 Defendants JOE TYLER ("Tyler") and ERAINA ORTEGA ("Ortega") in their official,
22 representative capacities as the directors of CAL FIRE and CalHR, respectively, have harmed
23 Plaintiffs Ralph Duran ("Duran") and Michael Esparza ("Esparza") and other CAL FIRE
24 employees, upon being forced to waive their privacy rights to avoid being disciplined. As a result
25 of these involuntary, compulsory privacy waivers, Color has collected and retained registering
26 CAL FIRE employees' biological samples and other private information without adequate
27 protection from disclosure and, on information and belief, has disclosed and/or may disclose or
28 continue to disclose, such information to third parties for non-legitimate purposes that extend far

beyond COVID-19 testing. On information and belief, because these unknown third parties are not subject to Color's privacy policies, and they have possessed and currently possess Plaintiffs' and other CAL FIRE employees' private medical, genetic and additional forced-disclosure personal information without being bound by any specific requirements to safeguard the information and without any restrictions on their ability to further disclose the information.

7. Other CAL FIRE employees have refused to consent to CAL FIRE's coerced privacy waivers and were not permitted to utilize Color's COVID-19 test. As a result, these employees suffered adverse employment actions imposed by Defendants. For example, Jeremy Hill ("Hill"), a long-time CAL FIRE employee, refused to consent to Color's privacy waivers, but rather than face punishment, he used a substantial amount of his accrued leave time to avoid testing. Hill's expenditure of his leave time was involuntary and undertaken as a last resort, to avoid the only two other alternatives – forced waiver of his privacy rights or discipline, including possible termination. On information and belief, another CAL FIRE employee was suspended for six months for refusing to consent to Color's privacy terms.

8. Based on the above conduct and the resulting harm to Plaintiffs and other CAL FIRE employees, Defendants have violated, and are violating, federal and California law. The federal law claims include violations of the Americans with Disabilities Act, 42 U.S.C. section 12101 et seq. ("ADA"), the Genetic Information Nondiscrimination Act, 42 U.S.C. section 2000ff, et seq. ("GINA"), and the rights to privacy and due process guaranteed under the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution. The state law claim includes the violation of the right to privacy under Article I, Section 1 of the California Constitution. Plaintiffs do not contest the State's now-dormant rule that unvaccinated employees and those who decline to reveal their vaccination status must be tested routinely for COVID-19. Rather, Plaintiffs seek injunctive and declaratory relief from this Court to (1) prevent Defendants from forcing them and similarly situated CAL FIRE employees to surrender their privacy rights as part of this testing process or expend accrued leave time to avoid the necessity to test, and (2) regain control of their private information from Defendants' agent, Color, and any persons or entities to whom Color has already disseminated any of it.

THE PARTIES

9. Plaintiff Duran is, and at all relevant times herein was, a fire captain permanently employed by CAL FIRE and assigned to Millerton Station 72, located in Friant, California. During all times the Mandatory Testing rule for COVID-19 has been in effect, Duran was subject to Mandatory Testing, and will remain subject to Mandatory Testing at any time Defendants, or any of them, require it to combat any disease outbreaks.

10. Plaintiff Esparza is, and at all relevant times herein was, a fire captain permanently employed by CAL FIRE and assigned to Station 9, located in Perris, California. During all times the Mandatory Testing rule for COVID-19 has been in effect, Esparza was subject to Mandatory Testing, and will remain subject to Mandatory Testing at any time Defendants, or any of them, require it to combat any disease outbreaks.

11. Defendant CAL FIRE is, and at all relevant times herein was, a State agency responsible for fire protection and stewardship of over 31 million acres of land across the State of California. CAL FIRE also provides varied emergency services, including municipal fire protection, emergency medical services, search and rescue response, hazardous materials mitigation, and natural disaster relief, throughout various counties in the State. At all relevant times herein, CAL FIRE employed Plaintiffs and all other CAL FIRE employees who were subject to Mandatory Testing. CAL FIRE's main office is located in Sacramento, California. CAL FIRE's employees are located throughout the State.

12. Defendant CalHR is, and at all relevant times herein was, the State department and agency designated as the representative of the Governor of the State to be the "employer" of CAL FIRE employees State-wide, pursuant to California Government Code §§ 3517 and 19815.4(g). As the employer, CalHR issued an order to unvaccinated/decline to disclose/fail to attest CAL FIRE employees that they will be subject to Mandatory Testing.

13. Defendant Tyler is the Director of CAL FIRE and is sued herein in his official, representative capacity. His office is located in Sacramento, California; his span of control is State-wide.

14. Defendant Ortega is the Director of CalHR and is sued herein in her official,

1 representative capacity. Her office is located in Sacramento, California; her span of control is
2 State-wide.

3 15. Defendants CAL FIRE, CalHR, Tyler, and Ortega shall be referred to collectively
4 as “Defendants.”

5 16. Plaintiffs are ignorant of the true names and capacities of defendants sued herein as
6 DOES 1 through 20, and therefore sue these defendants by such fictitious names. Plaintiffs will
7 amend this Complaint to state their true names and capacities once they have been ascertained.
8 Plaintiffs are informed and believe, and on that basis allege, that each of these defendants is in
9 some manner responsible for the acts complained of herein.

10 JURISDICTION AND VENUE

11 17. This is a civil action brought pursuant to the Americans with Disabilities Act, 42
12 U.S.C. § 12101, et seq. (“ADA”), the Genetic Information Nondiscrimination Act, 42 U.S.C. §
13 2000ff, et seq. (“GINA”), the Fourth, Fifth and Fourteenth Amendments of the U.S. Constitution,
14 and Article I, Section I of the California Constitution. Accordingly, this Court has subject matter
15 jurisdiction over the federal claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3), and 1343(a)(4).
16 This Court also may exercise, pursuant to 28 U.S.C. § 1367, its supplemental jurisdiction to hear
17 and decide the California constitutional claim as it is so related to the federal law claims that,
18 together, the two sets of claims form part of the same case or controversy.

19 18. Plaintiffs properly exhausted their administrative remedies for their ADA and
20 GINA claims, under 42 U.S.C. 2000e-5(e)(1), (f)(1), by presenting written claims, setting forth the
21 events and circumstances complained of herein, and lodging them with the appropriate agency, the
22 United States Equal Employment Opportunity Commission (“EEOC”), on or about April 6, 2022,
23 which occurred within two years of the accrual of the causes of action and prior to the filing of this
24 Complaint. On July 19, 2022, the EEOC issued a “right to sue” notice authorizing Plaintiffs to file
25 a lawsuit in any federal court of competent jurisdiction within 90 days.

26 19. Venue is proper in the Northern District of California under 28 U.S.C.
27 § 1391(b)(1), (b)(2), and (c)(2), because CAL FIRE’s and CalHR’s operations, and thus their
28 employees’ activities, including a substantial part of the events giving rise to the claims made

1 here, occur throughout the State, including at locations within this Court’s jurisdiction, and
 2 because Defendants CAL FIRE and CalHR are subject to this Court’s personal jurisdiction with
 3 respect to these claims.

4 **FACTUAL ALLEGATIONS**

5 20. On July 26, 2021, the Office of the Governor of the State of California issued a
 6 two-page press release (“Press Release”) announcing the implementation of a mandatory policy
 7 requiring all State employees to either show proof of vaccination against COVID-19 or be tested
 8 for infection at least once a week. On the same date, the Labor Relations Office of CalHR issued a
 9 separate two-page notice, the CalHR Notice, regarding these measures to most if not all State
 10 employee representatives, including CAL FIRE Local 2881 (“Local 2881”), the labor union that
 11 represents CAL FIRE’s employees in State Bargaining Unit 8, including Plaintiffs, in collective
 12 bargaining and other labor matters. The CalHR Notice orders all “State departments” to
 13 “implement mandatory COVID-19 testing of unvaccinated state employees in addition to other
 14 precautions already required for unvaccinated employees.”

15 21. In compliance with the governor’s order, CAL FIRE implemented, in August 2021,
 16 Mandatory Testing for its employees who are not fully vaccinated. In its Temporary Directive to
 17 all CAL FIRE employees issued on August 23, 2021, as well as the extension to that directive
 18 issued on March 1, 2022, CAL FIRE warned employees that if they fail to get tested, they “shall
 19 be excluded from CAL FIRE facilities” and “**may [be subject to] disciplinary action up to and**
 20 **including dismissal.**” (Emphasis added.) CAL FIRE also issued an email notice to its employees
 21 on August 18, 2021 that provided the following warning: “If you do not test as required, you will
 22 be excluded from CAL FIRE facilities. Failure to comply with the mandatory weekly testing
 23 policy may result in disciplinary action up to and including dismissal.”

24 22. Also included in CAL FIRE’s email notice was the mandate that all employees
 25 subject to testing are required to register on Color’s website. As part of this process, each
 26 registering CAL FIRE employee must provide personal information, which includes, on
 27 information and belief, date of birth, social security number, address, and health information
 28 including pregnancy status and whether the employee or a member of the employee’s family was

1 exposed to COVID-19.

2 **Color's Original Policies**

3 23. During the registration process—and thus before taking the test—each registering
4 CAL FIRE employee must agree to Color's "Privacy Policy" and "Services Disclosures,"
5 including its "Terms of Service." If a registrant refuses to consent to these terms, Color will not
6 allow them to be tested. For those employees who must test per CAL FIRE's rules, a refusal to
7 consent to Color's policies means that they will be subject to discipline up to and including
8 dismissal.

9 24. On information and belief, as of January 19, 2022, Color's policies were in the
10 form of an 11-page "Privacy Policy" ("Original Privacy Policy") and a 32-page set of "Services
11 Disclosures" ("Original Services Disclosures"), which included Color's "Terms of Service"
12 ("Original Terms of Service"). These documents, collectively referred to as "Color's Original
13 Policies," were provided to Local 2881 by Stephanie Portela, the Chief of CAL FIRE's Labor
14 Relations Office, who represented on January 19, 2022 that these were the privacy policies and
15 services disclosures that were both in effect on that date and applied to Mandatory Testing.

16 25. The privacy waivers included in Color's Original Policies give Color significant
17 leeway to collect and to disclose employees' personal, confidential information, including
18 personal identifiers, test results, other health information, and internet activity, to various parties,
19 such as CAL FIRE and CalHR, other governmental agencies on the federal, state and local levels,
20 and other third parties. The potential number of third parties to which Color may disclose
21 information under these privacy waivers is significant. The privacy waivers have broad language
22 that encompasses third-party laboratories, healthcare providers and other service providers,
23 universities, independent companies that may or may not be involved with the COVID-19 testing
24 process, and **other third parties which are not identified**. Furthermore, the language used in
25 these waivers is vague and contradictory, thus causing confusion about what rights the employees
26 are actually waiving.

27 26. The privacy waivers allow Color to disclose employees' confidential information to
28 a panoply of entities, some identifiable and others not, for many reasons beyond simply

1 completing the testing process. For example, Color may disclose information for research,
 2 marketing, and business purposes that may even be entirely unrelated to its business of COVID-19
 3 testing. Additionally, Color “may disclose [employees’] information **when [it] believe[s] in good**
 4 **faith that doing so is appropriate or necessary in order to enforce our Terms of Service.”**
 5 (Emphasis added.) This vague language appears to be a catch-all for Color to apply in a broad
 6 range of contexts, constituting a significant waiver of employees’ privacy rights.

7 27. Color’s Original Privacy Policy also includes privacy waivers with respect to
 8 employees’ genetic and personal and family health information (“PFHI”), which is defined as
 9 follows: “information about you and, for certain services, about your biological family [].
 10 Personal and Family Health Information for Color’s genetic Services also includes information
 11 about your history of certain health conditions, your family history of those conditions, your
 12 medication history, and any known genetic mutations in you or your family members.”

13 28. Color also disavows any responsibility for its [unnamed] partners and vendors’
 14 products and how those partners and/or vendors provide services, and it refers registering
 15 employees to these third parties’ policies and terms and conditions. Thus, employees registering
 16 for Color’s COVID-19 tests, whether or not they agree, will be subject to yet another set or sets of
 17 undefined and potentially expansive terms and conditions governing how these (again,
 18 unidentified/unidentifiable) third parties handle their confidential information.

19 29. Color also notifies registering employees that it may disclose their confidential
 20 information to non-domestic third parties, which **may not be subject to federal or state**
 21 **confidentiality laws.** Thus, CAL FIRE employees who are users of Color’s COVID-19 testing
 22 service are forced to consent to the possibility that their information is and will be afforded less
 23 protection than what is required under American laws, or no protection at all if the recipient of the
 24 information is located in a jurisdiction where no privacy laws exist.

25 **Color’s Revised Policies**

26 30. On information and belief, at some point after January 19, 2022, the date when
 27 Local 2881 obtained copies of Color’s Original Policies from CAL FIRE’s labor relations team,
 28 Color made significant changes to these policies, which are reflected in the terms on Color’s

1 online registration portal for Mandatory Testing (“Registration Portal”)¹ such that Color’s current
 2 policies are different from Color’s Original Policies discussed above in Paragraphs 23 – 29.
 3 Color’s Registration Portal itself contains privacy waivers, and it also has electronic links to a
 4 Privacy Policy (“Revised Privacy Policy”) and Terms of Service (“Revised Terms of Service”)
 5 (The Registration Portal’s privacy policy, as well as the Revised Privacy Policy and the Revised
 6 Terms of Service are referred to collectively as “Color’s Revised Policies”). Registering CAL
 7 FIRE employees must agree to each of Color’s Revised Policies to complete the registration
 8 process.

9 31. It is not clear when Color’s policies changed from Color’s Original Policies to
 10 Color’s Revised Policies and the Registration Portal is silent on this subject. The Revised Privacy
 11 Policy states that it was last updated in March 2022; however, on April 29, 2022, CAL FIRE’s
 12 Chief of Labor Relations, Stephanie Portela, assured Local 2881 that Color’s Original Policies still
 13 governed the Mandatory Testing process.

14 32. Color’s Revised Policies governing testing, in comparison to Color’s Original
 15 Policies, appear to require more limited privacy waivers. For example, the Revised Privacy Policy
 16 states that its terms do not apply when Color is testing on behalf of an employer and a separate
 17 contract between that employer and Color exists. The State, through its Public Health Department,
 18 entered into an agreement with Color (“Color-CDPH Agreement”) on August 18, 2021. Yet, the
 19 “statement of non-applicability” in the Revised Privacy Policy (which should apply because of the
 20 Color-CDPH Agreement) conflicts with the Revised Terms of Service, which require at Section
 21 6(a), that registering CAL FIRE employees represent and warrant that they have reviewed and
 22 agree to Color’s Revised Privacy Policy. Since the Revised Terms of Service incorporate the
 23 Revised Privacy Policy, they appear to bind registering CAL FIRE employees, including
 24 Plaintiffs, to the Revised Privacy Policy despite the existence of the Color-CDPH Agreement.

25 33. CAL FIRE employees are not parties to the Color-CDPH Agreement. Thus,
 26

27 ¹ The Registration Portal is the internet site owned and operated by Color where CAL FIRE
 28 employees, including Plaintiffs Duran and Esparza, completed Color’s testing registration process.
 The Registration Portal is accessible via computers, tablets, and smart phones.

1 registering CAL FIRE employees, including Plaintiffs, cannot enforce the terms of that agreement
2 to the extent it includes terms governing the confidentiality of employees' private information
3 obtained by Color. Furthermore, the Revised Privacy Policy states that Color may change its
4 privacy policies at any time. Thus, there exists a real risk of Color unilaterally reinstating the
5 privacy waivers in the Original Privacy Policy or adding new, more expansive waivers that would
6 apply to test-takers.

7 34. The Registration Portal and the Revised Terms of Service include mandatory
8 privacy waivers, and both continue to apply to registering CAL FIRE employees, including
9 Plaintiffs, despite the existence of the Color-CDPH Agreement. Unlike the Revised Privacy
10 Policy, the Registration Portal and the Revised Terms of Service makes no reference to the Color-
11 CDPH Agreement. Accordingly, there are no provisions on the Registration Portal or in the
12 Revised Terms of Service stating that the Color-CDPH Agreement supersedes their privacy terms.

13 35. In the Revised Terms of Service that apply to registering CAL FIRE employees,
14 including Plaintiffs, these employees must grant Color a license to use any information they
15 submit to Color. The provision in the Revised Terms of Service constitutes a substantial waiver of
16 rights as the information that registering employees submitted to Color includes highly personal
17 and confidential information and the license granted to Color to use this information "to operate
18 and provide the Services" lacks any qualifying language limiting it to reasonable uses. The license
19 is therefore excessively broad, allowing Color to disclose confidential information to a wide array
20 of entities and individuals for a myriad of purposes that are not disclosed to the test-taker.

21 36. Similar to Color's Original Policies, the Registration Portal includes terms stating
22 that Color or CDPH can share information for testing, billing and research purposes. Though a
23 CAL FIRE employee can opt out of these studies, he or she can only do so after registering for the
24 test (and thus first agreeing to this type of sharing) and submitting a request separately.

25 37. Various provisions of Color's Original Policies and Revised Policies allow Color
26 and CDPH to disclose employees' confidential information to the extent permitted by federal,
27 state, and local law. Because Defendants forced registering CAL FIRE employees, including
28 Plaintiffs, to waive their privacy rights under pain of discipline, these privacy waivers are not

1 lawful and any disclosures of CAL FIRE employees' confidential information by Color, CDPH, or
 2 third-party recipients pursuant to these provisions of Color's Original Policies and Revised
 3 Policies are not permissible.

4 38. Color's requirement that registering employees consent to the mandatory privacy
 5 waivers in both Color's Original Policies and Revised Policies is unmistakable, as the policies
 6 provide clear statements that the employee, by registering electronically to use Color's service, is
 7 authorizing Color to disclose his/her/their confidential information to third parties.

8 39. Color informs employees in both Color's Original Policies and Revised Policies
 9 that it may retain records of their confidential information indefinitely, even if the employees
 10 request Color to stop using their information. These acknowledgements themselves constitute a
 11 privacy waiver for two reasons: (a) Color remains in possession of information unwillingly
 12 disgorged by registering employees and (b) the longer Color retains such information, the greater
 13 the likelihood that it will be disclosed to third parties.

14 40. Color's Original Policies and Revised Policies do not require Color to ensure that
 15 the recipients of registering CAL FIRE employees' private information limit the recipient's use or
 16 disclosure of such information. Accordingly, once Color discloses employees' private information,
 17 the recipients are not bound by even Color's flawed privacy policies.

18 **Plaintiff Michael Esparza**

19 41. From approximately August 2021 to September 2022, most CAL FIRE employees
 20 who were subject to Mandatory Testing have participated in the Color registration process and
 21 thus have waived their privacy rights. A number of these employees objected to the Department
 22 requiring them to do so. Nonetheless, they consented to Color's privacy waivers in order to avoid
 23 suffering any adverse disciplinary action. By holding the threat of punishment over its employees,
 24 Defendants coerced those who object to Color's policies to acquiesce to them.

25 42. For example, Plaintiff Esparza had strong reservations about divulging his personal
 26 information to Color and waiving his privacy rights pursuant to Color's policies. He preferred to
 27 decline to participate in Color's registration process for these reasons. Yet, he was unwilling to
 28 take this step because he feared being subject to discipline for failing to undergo Mandatory

1 Testing (which he could not do without registering with Color). He did not have enough accrued
 2 leave to take time off to avoid discipline. Therefore, he registered with Color, under protest, a
 3 minimum of three times.

4 **Plaintiff Ralph Duran**

5 43. Another example is Plaintiff Duran. Like Esparza, Duran would have boycotted
 6 Color's registration process to protect his privacy if he was not going to be punished for it. He is
 7 confident that had he refused to register, he would have been disciplined. He received written
 8 warnings from CAL FIRE regarding the consequences of refusing to test, which included
 9 discipline up to and including dismissal. It is known in the Department that management planned
 10 to act on these warnings, including suspending employees for 6 months without pay for their first
 11 refusal to test and terminating them upon a second refusal to test. Duran also did not have enough
 12 accrued time to take personal leave for a significant period of time.

13 **Other CAL FIRE Employees**

14 44. Jeremy Hill ("Hill"), a fire captain specialist, has worked for CAL FIRE for over 30
 15 years, and currently performs law enforcement and investigatory duties for the Department.

16 45. Due to his unvaccinated status, Hill was required to undergo Mandatory Testing
 17 through Color's testing process under the Department's rules. On December 31, 2021, he
 18 informed his superiors, Battalion Chief Seth Brown and Division Chief Michael Bowman, that he
 19 refused to consent to Color's Privacy Policy and Terms of Service because it would allow Color to
 20 use his personal information beyond the purposes of the COVID-19 test, including sharing his
 21 personal information with unidentified third parties. **But, Hill was careful to point out that he**
 22 **was not refusing to take the test—he simply disagreed with Color's policies.** In fact, he told
 23 his superiors that while he refused to register with Color, he was willing to take the COVID-19
 24 self-test in front of them as proof of his compliance with the Department's testing policy. They
 25 refused Hill's proposal, however, telling Hill that he must register with Color because it is a
 26 mandatory process.

27 46. At that point, Hill was left with only one avenue to avoid Color's privacy waivers
 28 while remaining free from discipline for refusing to take the test. His long tenure with the

1 Department allowed him to accrue a large amount of paid leave time that he was hoping to use
 2 incrementally over time to spend with his family. He abandoned this plan, however, to avoid the
 3 invasion of his privacy. He used his accrued leave time to take time off from work from December
 4 31, 2021 to February 23, 2022.

5 47. When Hill returned to work on February 24, 2022, the Department allowed him to
 6 take a different COVID-19 test from a different vendor which collected his saliva for testing rather
 7 than taking a nasal swab. The change in testing resulted from Hill's request for a religious
 8 exemption so he would not have to be subjected to, at least in part, Color's nasal swab test. The
 9 Department reasonably accommodated Hill by allowing him to use the saliva test. Though Hill's
 10 application for a religious exemption was submitted in November 2021, the saliva test did not
 11 become available until after December 31, 2021, when Hill was on leave.

12 48. Hill is informed and believes that although he had to consent to limited privacy
 13 waivers for the saliva test, these were far less extensive than those required by Color. To
 14 Plaintiffs' knowledge, the only employees who are able to use the saliva test are ones who have
 15 applied for religious or medical exemptions from COVID-19 nasal swab testing and have been
 16 reasonably accommodated by the Department by being offered the saliva test. Thus, most
 17 employees who are subject to testing must use the Color nasal swab tests regardless of any
 18 objections that they may have regarding its privacy waivers.

19 49. Upon information and belief, at least one employee was suspended for six months
 20 for refusing to comply with Mandatory Testing. Although that employee objected to the
 21 Department's testing regime for reasons other than the privacy waivers at issue here, his
 22 punishment shows the severe consequences that employees face if they boycott testing over
 23 Color's privacy waivers and have insufficient accrued leave time, the only other option available
 24 to them.

25 **CAL FIRE Announced That It Is "Transitioning Away" from Mandatory Testing**

26 50. In an email dated September 15, 2022 ("September 2022 Notice"), CAL FIRE
 27 notified employees that it would begin "transitioning away from mandatory testing." The notice
 28 gave little explanation regarding the future of the program since the Department is "currently

1 working on the details” of the transition. The only details it did provide were that the Department
 2 and its employees were still required to comply with any remaining rules governing the prevention
 3 of the spread of infection. Specifically, the Department, in its September 22 Notice, stated as
 4 follows:

- 5 • The end of the routine testing program “does not end our responsibility to follow
 6 Cal/OSHA Emergency Temporary Standard and the corresponding Department
 7 COVID Prevention Plan, as well as Department of Public Health guidelines.”
 8 Accordingly, the Department “will likely retain test kits in specific locations to
 9 provide to employees if the need arises.”
- 10 • “Similarly, until CalHR provides further direction regarding the disposition of testing
 11 supplies, all testing sites should retain what they have on hand.”
- 12 • “COVID Positive Reporting and Notification requirements will remain in place until
 13 further notice. As such, units and programs should continue to follow Positive
 14 COVID 19 Reporting Guidance, as outlined in the COVID-19 Guidance on the CAL
 15 FIRE intranet, if an employee indicates a positive test.”
- 16 • “CAL FIRE employees are still subject to any testing mandates in place with local
 17 governments or other State departments.”

18 The September 2022 Notice ended with the acknowledgement that details regarding the future of
 19 the testing program remain undecided and that the Department will share more information when it
 20 becomes available. Given these caveats and lack of any substantive details regarding how the
 21 transition from Mandatory Testing will occur, it is not clear which aspects of the program are
 22 ending and which are continuing. It remains possible, even likely, that testing mandates may
 23 remain in place for some employees who are unvaccinated or refuse to disclose their vaccination
 24 status, or even for vaccinated employees who have been exposed to COVID-19.

25 51. The Department’s transition away from Mandatory Testing does not render
 26 Plaintiffs’ claims moot, for the following reasons:

27 (a) First, even if Defendants were to cease requiring CAL FIRE employees to test for
 28 COVID-19 as part of this transition, on information and belief, Color will continue to retain the

1 confidential information of employees who have already tested through the mandatory program.
 2 (“Although Color can remove [employees’] information from its active database, some or all of
 3 [employees’] information will remain in Color’s inactive database for compliance with legal,
 4 regulatory or other requirements.”) Thus, a real risk remains that Color will disclose such
 5 information to third parties. Defendants should require Color to identify those employees whose
 6 information it continues to retain, to cease using such information, and to delete or otherwise
 7 destroy such information in its records.

8 (b) Second, on information and belief, Color has already disclosed employees’
 9 confidential information to third parties in violation of employees’ rights. Defendants should
 10 require Color to (i) name those third parties to which it has disclosed employees’ confidential
 11 information, (ii) identify those employees whose confidential information has been compromised,
 12 and (iii) use its best efforts to cause these third parties to stop using, delete, or otherwise destroy,
 13 employees’ confidential information.

14 (c) Third, as indicated in the September 2022 Notice, CAL FIRE may continue to
 15 mandate testing for at least certain employees in certain contexts going forward. For example, the
 16 September 22 Notice states that employees must continue to test if State or local rules require it.
 17 This could include the circumstance where future outbreaks require Defendants to reinstate routine
 18 Mandatory Testing for large numbers of CAL FIRE employees. Accordingly, Defendants should
 19 prohibit Color from requiring employees to waive their privacy rights in future testing.

20 **Defendants Knew That Color Required Employees To Waive Privacy Rights**

21 52. Defendants should have known from as early as August 2021 that Color required
 22 CAL FIRE employees to waive their privacy rights. Pursuant to its agreement with the State,
 23 Color administered the Mandatory Testing program through a “single program and software
 24 platform,” starting in August 2021. Thus, Defendants could have accessed this platform to view
 25 how the registration process was conducted and what terms employees were required to agree to
 26 before testing. Plaintiffs also informed CAL FIRE that Color’s privacy waivers were a prerequisite
 27 to testing. At a minimum, as stated above in Paragraph 45, Hill informed his superiors on
 28 December 31, 2021 that Color prohibited employees from taking a COVID-19 test without first

1 consenting to its privacy policy and terms of service, to which he objected.

2 53. Furthermore, in November 2021, Local 2881 contacted the Department on behalf
3 of its members, including Plaintiffs, to discuss the forced privacy waivers and the harm that its
4 members will suffer and have suffered by the coerced waivers, in the form of retention and
5 disclosure, to unknown third parties, of their personal, confidential information. The union and the
6 Department met and conferred multiple times regarding these issues, but the Department failed to
7 take any actions to protect employees' information from disclosure.

8 54. On February 16, 2022, Local 2881 sent a demand to the Department, on behalf of
9 its members, including the Plaintiffs, to cease and desist from forcing unvaccinated employees (or
10 those who chose to keep their vaccination status to themselves) to waive their privacy rights as
11 part of the Mandatory Testing program, and to either compel Color to change its policies
12 immediately before any further tests are conducted or immediately stop the testing program
13 altogether until another testing vendor, who does not require illegally expansive privacy waivers,
14 can provide the tests. Local 2881 further demanded that the Department immediately take all legal
15 steps necessary to prevent further dissemination of, and to retrieve, the confidential information
16 that registering CAL FIRE employees have provided to Color as part of the testing process. It also
17 requested that the Department provide information sufficient to identify those employees whose
18 information was disseminated by Color to third parties and to explain any steps that the
19 Department has taken to stop such disclosures and retrieve employees' confidential information.
20 Again, the Department failed to take any action regarding the union's concerns.

21 **Plaintiffs Exhausted Administrative Remedies**

22 55. On April 6, 2022, Plaintiffs filed a charge with the EEOC alleging violations of the
23 ADA and GINA. On July 19, 2022, the EEOC issued a "right to sue" notice, authorizing Plaintiffs
24 to file a lawsuit within 90 days. Plaintiffs timely filed this action within this time limit.

25 56. The EEOC forwarded Plaintiffs' allegations to the CRD, which issued a "right to
26 sue" notice with the filing date of April 6, 2022. Per the notice, Plaintiffs have one year in which
27 to file suit. This time period shall be tolled during the pendency of the EEOC's investigation,
28 which ended on July 19, 2022. Plaintiffs timely filed this action within this time limit.

1 **FIRST CAUSE OF ACTION**

2 **VIOLATION OF 42 U.S. CODE SECTION 12112(D)**

3 **Against Defendants Tyler and Ortega and Does 1-10**

4 57. Plaintiffs hereby incorporate by reference Paragraphs 1 – 56 hereof as though fully
5 set forth herein.

6 58. The ADA limits the type of medical inquiries and examinations an employer may
7 require of its employees as well as the ways in which an employer may use confidential
8 information obtained from such inquiries. Under the ADA, employers “shall not require a medical
9 examination and shall not make inquiries of an employee as to whether such employee is an
10 individual with a disability or as to the nature or severity of the disability, unless such examination
11 or inquiry is shown to be job-related and consistent with business necessity.” 42 U.S.C. §
12 12112(d)(4)(A). *See also*, 29 C.F.R. § 1630.14(c). Section 12112(d)(4)(A) of the ADA applies in
13 this case because the State has determined that it is necessary for its unvaccinated employees, and
14 those who choose not to disclose their vaccination status, to undergo Mandatory Testing for
15 COVID-19 to determine whether they can perform their jobs.

16 59. COVID-19 may reach the level of a disability under Title I of the ADA, pursuant to
17 EEOC guidance. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation*
18 *Act, and Other EEO Laws*, (Updated on July 12, 2022), available at
19 [https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws)
20 [and-other-eeo-laws](https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws), at N.2. “Even if the symptoms related to COVID-19 come and go, COVID-19
21 is an actual disability if it substantially limits a major life activity when active.” *Id.* Examples
22 where COVID-19 substantially limits major life activities are: “ongoing but intermittent multiple-
23 day headaches, dizziness, brain fog, and difficulty remembering or concentrating;” “supplemental
24 oxygen [treatment] for breathing difficulties and ha[ve] shortness of breath, associated fatigue, and
25 other virus-related effects that last, or are expected to last, for several months;” or “heart
26 palpitations, chest pain, shortness of breath, and related effects due to the virus that last, or are
27 expected to last, for several months.” *Id.* at N.4.

28 60. Upon information and belief, CAL FIRE’s Mandatory Testing program is intended

1 to identify those employees who have COVID-19—and thus may potentially have a disability—
 2 and make sure that they do not report to work. Mandatory Testing constitutes the type of medical
 3 examination which is covered by 42 U.S.C. § 12112(d).

4 61. All information obtained from these types of “medical examinations” or “inquiries”
 5 must remain confidential:

6 [I]nformation obtained regarding the medical condition or history of
 7 the applicant is collected and maintained on separate forms and in
 8 separate medical files and is treated as a confidential medical record,
 9 except that—(i) supervisors and managers may be informed
 10 regarding necessary restrictions on the work or duties of the
 11 employee and necessary accommodations; (ii) first aid and safety
 12 personnel may be informed, when appropriate, if the disability might
 require emergency treatment; and (iii) government officials
 investigating compliance with this chapter shall be provided relevant
 information on request....

13 42 U.S.C. § 12112(d)(3)(B). *See also* 29 C.F.R. § 1630.14(c)(1) (providing similar language).

14 62. Defendants Tyler and Ortega, in their official capacity and as representatives of
 15 CAL FIRE and CalHR, respectively, have violated and continue to violate the ADA and its
 16 regulations by requiring employees, on pain of discipline up to termination, to use Color for
 17 Mandatory Testing, and in doing so, to provide confidential information to Color during the
 18 registration process and consent to its privacy policies, which require significant waivers of their
 19 privacy rights, including coerced consent to release of their personal information to unknown
 20 actors. These Defendants have been aware, during the time that Mandatory Testing has been in
 21 place, that Color requires employees to waive their privacy rights. At minimum, individual
 22 employees have informed CAL FIRE’s management of these waivers, and Local 2881 has
 23 expressed on multiple occasions its concerns to the Department that these privacy waivers violate
 24 the law. Defendants’ agent, Color, formulated these policies, and Defendants, including Tyler and
 25 Ortega, knowingly enforce the policies, which include expansive privacy waivers. A member of
 26 the public has the ability to decline Color’s policies, without consequence, if he or she objects to
 27 them, and can either refuse to test or find another testing company whose policies are less
 28 objectionable. CAL FIRE employees, including Plaintiffs, do not have this freedom. If they refuse

1 to consent to Color’s terms, they cannot take the test and they will suffer an adverse employment
 2 action, including being forced to use their accrued leave because they are deemed not fit for duty
 3 or being disciplined, up to and including dismissal.

4 63. Plaintiffs and other CAL FIRE employees have been irreparably harmed by Tyler’s
 5 and/or Ortega’s violation of the ADA, the full extent of which is unknown at this time. (a) As
 6 stated above, upon information and belief, at least one employee has suffered discipline for
 7 refusing to register with Color. (b) Hill objected to Color’s privacy policies, and the only way he
 8 could avoid waiving his privacy rights, without being disciplined, was to use his accrued leave. (c)
 9 Other CAL FIRE employees, like Plaintiffs Duran and Esparza, also object and have objected to
 10 disclosing their personal, confidential information to Color and being subject to its privacy
 11 waivers; they have suffered the substantial harm of having their privacy rights nullified to avoid
 12 disciplinary action.

13 64. The irreparable harm resulting from these privacy waivers is substantial, since
 14 many of Color’s terms give Color significant discretion to disclose registering employees’
 15 confidential information. Of these, two terms in Color’s Original Policies are particularly
 16 egregious. First, Color has wide discretion to “disclose [employees’] information **when [it]**
 17 **believe[s] in good faith that doing so is appropriate or necessary in order to enforce our**
 18 **Terms of Service.**” (Emphasis added.) Second, Color may disclose information to third parties
 19 that “**may no longer be protected by federal or state medical confidentiality laws** if the
 20 recipient of [employee’s] PHI is not subject to such laws and may be redisclosed by the recipient.”
 21 (Emphasis added.) Even the privacy waivers in Color’s Revised Policies, which apply to current
 22 testing, are legally infirm, notably, Color’s requirement that employees grant it a license to “use,”
 23 which may include disclosing, any User Content for a broad range of activity, that is vaguely
 24 described as “operat[ing] and provid[ing]” Color’s services. If prompt and immediate injunctive
 25 relief is not granted, Plaintiffs and other CAL FIRE employees face a significant risk of more
 26 irreparable harm as their privacy rights are waived and their confidential information is disclosed
 27 to third parties. Such threat of future injuries cannot be adequately compensated through an award
 28 of damages or otherwise remedied at law.

1 65. WHEREFORE, Plaintiffs pray for the relief set forth in Paragraphs 1 – 12 in the
2 Prayer section below, to avoid further irreparable harm.

3 **SECOND CAUSE OF ACTION**

4 **VIOLATION OF 42 U.S. CODE SECTION 2000FF-1(B)**

5 **Against Defendants Tyler and Ortega and Does 1-10**

6 66. Plaintiffs hereby incorporate by reference Paragraphs 1 – 65 hereof as though fully
7 set forth herein.

8 67. Color states in its Original Privacy Policy that it may use employees’ genetic
9 information for research purposes with “third party collaborators.” This language indicates that
10 Color intentionally collects and retains employees’ genetic information from the COVID-19 nasal
11 swab tests; thus, this information may be included in the test “Results,” “PHI,” and other
12 “information” to which Color’s Original Privacy Policy and Original Services Disclosures refer.
13 Color’s Original Privacy Policy does not define or describe what is specifically included under
14 PHI, thus it may include genetic information. And, the Original Privacy Policy seeks a waiver
15 from the employee to transfer “some or all information about you in connection with” business
16 transactions, or worse, negotiations for these transactions that may end up terminating before they
17 are concluded. Color’s Revised Policies also permit Color to disclose “personal” and “medical”
18 information, which are defined to include genetic information and family history. For example, in
19 the Revised Terms of Services, “Services” is defined as including “[g]enetic testing (a “Genetic
20 Test(s)”) and supporting services,” and “User Content” is defined as including “family history.”
21 The Registration Portal also states that either Color or CDPH may share employees’ information
22 for research studies.

23 68. Section 2000ff-1(b) of GINA prohibits an employer from “request[ing], requir[ing],
24 or purchas[ing] genetic information with respect to an employee or a family member of the
25 employee” except under specific circumstances. “Genetic information” as used in GINA means
26 “with respect to any individual, information about (i) such individual’s genetic tests, (ii) the
27 genetic tests of family members of such individual, and (iii) the manifestation of a disease or
28 disorder in family members of such individual.” 42 U.S.C. 2000ff(4)(A). Because Defendants,

1 including Tyler and Ortega, are coercing registering CAL FIRE employees, including Plaintiffs,
 2 under the threat of discipline, to complete Color's registration process and thereby consent to the
 3 deliberate collection of data including genetic information and family history, all of which falls
 4 squarely under the definition of "genetic information" in the statute, Defendants Tyler and Ortega,
 5 in their official capacity and as representatives of CAL FIRE and CalHR, respectively, violate
 6 Section 2000ff-1(b) of GINA.

7 69. Defendants, including Tyler and Ortega, force CAL FIRE employees to undergo
 8 Mandatory Testing, including Color's obligatory registration and the nasal swab test, under threat
 9 of discipline; therefore, any collection of data regarding employees' family histories and
 10 individual genetic material from the testing process is intentional. Upon information and belief,
 11 none of the following -- CAL FIRE, CalHR, Tyler, Ortega or Color -- instructed registering CAL
 12 FIRE employees **not** to provide family history or genetic information, and no exclusion of
 13 collection or use of family history or genetic information from registering CAL FIRE test-takers is
 14 undertaken. To the contrary, Color expressly includes in its policies active solicitation of, and at
 15 bare minimum, the option to collect and use, family history and genetic information.

16 70. Registering CAL FIRE employees do not provide knowing, voluntary consent to
 17 the collection and use of their family history or genetic information. Rather, employees' consent to
 18 Color's Privacy Policy and Service Disclosures are coerced by Defendants' insistence on
 19 registering CAL FIRE employees' consent to Color's policies.

20 71. Defendants, including Tyler and Ortega, had a duty, which they failed to fulfill, to
 21 ensure that Color did not and does not engage in conduct violating GINA. The regulations state,

22 The prohibition on acquisition of genetic information, including
 23 family medical history, applies to medical examinations related to
 24 employment. A covered entity must tell health care providers not to
 25 collect genetic information, including family medical history, as part
 26 of a medical examination intended to determine the ability to
 27 perform a job, and must take additional reasonable measures within
 its control if it learns that genetic information is being requested or
 required.

28 29 C.F.R. § 1635.8(d).

72. Plaintiffs and other registering CAL FIRE employees have been irreparably harmed by the violation of 42 U.S.C. Section 2000ff-1(b), the full extent of which is unknown at this time. The genetic information and family histories of Plaintiffs Duran and Esparza and other registering CAL FIRE employees are no longer within their control due to the coerced submission to Color's policies.

73. WHEREFORE, Plaintiffs pray for the relief set forth in Paragraphs 1 – 12 in the Prayer section below, to avoid further irreparable harm.

THIRD CAUSE OF ACTION

VIOLATION OF 42 U.S. CODE SECTION 2000FF-5(B)

Against Defendants Tyler and Ortega and Does 1-10

74. Plaintiffs hereby incorporate by reference Paragraphs 1 – 73 hereof as though fully set forth herein.

75. Defendants Tyler and Ortega, in their official capacity and as representatives of CAL FIRE and CalHR, respectively, violate Section 2000ff-5 of GINA, which mandates that an employer treat genetic information "as a confidential medical record," 42 USC § 2000ff-5(a), and thus limits an employer's ability to disclose employees' genetic information. *See* 42 USC § 2000ff-5(b). Though there are certain carve-outs under this Section 2000ff-5(b) allowing such information to be disclosed under certain circumstances, none of these apply here. Section 2000ff-5(b)(2), for example, provides an exception for research purposes, but this research must be "conducted in compliance with the regulations and protections provided for under part 46 of title 45, Code of Federal Regulations," which concerns "Protection of Human Subjects." Color does not address whether these regulations are being followed.

76. Section 2000ff-5(b)(6) permits disclosure of information regarding "the manifestation of a disease or disorder in family members of" an employee to government agencies concerning "a contagious disease that presents an imminent hazard of death or life threatening illness." 42 U.S.C. § 2000ff-5(b)(6). Though COVID-19 fits this description, Color's privacy waivers permit it to disclose genetic information to parties other than federal, state, and local agencies. Thus, Color's disclosure of such information to third parties violates GINA.

1 to identify which employees may have COVID-19. Health providers who provide diagnostic
 2 services generally provide assurances to patients that their personal information will be protected.
 3 The policy waivers required by Color's terms of service are not consistent with these types of
 4 assurances, however, as they are excessively broad. They give Color, governmental authorities,
 5 and third parties the discretion to collect, maintain and disclose employees' personal information
 6 for a wide range of purposes that go beyond testing and diagnostics.

7 83. Registering CAL FIRE employees', including Plaintiffs', coerced waivers of their
 8 privacy rights do not make their expectation of privacy unreasonable. Their consent was given
 9 involuntarily as a result of Defendants' threats to impose discipline on those who did not comply.

10 84. On information and belief, Defendants' wrongful conduct has caused Color to
 11 disclose, and/or at minimum, have the means and ability to disclose, registering CAL FIRE
 12 employees', including Plaintiffs', private information to third parties for reasons unrelated to
 13 testing, and has caused CAL FIRE employees' information to be retained by Color and third
 14 parties without adequate safeguard from further disclosure. Those CAL FIRE employees, such as
 15 Hill, who refused to waive their privacy rights per Color's policies, also suffered harm – in the
 16 form of compulsory use of accrued leave (Hill) or discipline. Defendants' conduct in requiring
 17 CAL FIRE employees to consent to broad policy waivers or suffer the consequences constitutes a
 18 serious, substantial intrusion into Plaintiffs' privacy rights.

19 85. Defendants' conduct in requiring CAL FIRE employees to consent to Color's broad
 20 privacy waivers serves no compelling or legitimate interest. Additionally, on information and
 21 belief, at all relevant times Defendants have been able to exert substantial leverage in negotiating
 22 the terms of their vendor contracts, including those with their testing vendors, and in the absence
 23 of a satisfactory agreement, Defendants may retain alternate vendors. Given Defendants'
 24 bargaining power and vendor options, Color's privacy policies, which provide inadequate
 25 protection from disclosure, offer no safe harbor to Defendants when balanced against Plaintiffs'
 26 fundamental interest in the privacy of their personal information.

27 86. Plaintiffs and other similarly situated CAL FIRE employees have been irreparably
 28 harmed by Defendants' violation of Article I, Section 1 of the California Constitution, the extent

1 of which is unknown at this time.

2 87. WHEREFORE, Plaintiffs pray for the relief set forth in Paragraphs 1 – 12 in the
3 Prayer section below.

4 **FIFTH CAUSE OF ACTION**
5 **VIOLATION OF THE RIGHT TO PRIVACY UNDER THE FOURTH AMENDMENT**
6 **OF THE U.S. CONSTITUTION**

7 **Against Defendants Joe Tyler and Eraina Ortega and Does 1-10**

8 88. Plaintiffs hereby incorporate by reference Paragraphs 1 – 87 hereof as though fully
9 set forth herein.

10 89. The Ninth Circuit Court of Appeals employs a balancing test to determine whether
11 the governmental interest in obtaining an individual’s personal information outweighs his or her
12 privacy interest under the Fourth Amendment of the U.S. Constitution. *Tucson Woman’s Clinic v.*
13 *Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (abrogated on other grounds by *Dobbs v. Jackson*
14 *Women’s Health Organization*, 142 S.Ct. 2228 (2022)). This test looks at the following five
15 factors: “(1) the type of information requested, (2) the potential for harm in any subsequent non-
16 consensual disclosure, (3) the adequacy of safeguards to prevent unauthorized disclosure, (4) the
17 degree of need for access, and (5) whether there is an express statutory mandate, articulated public
18 policy, or other recognizable public interest militating toward access.” *Id. See also, Doe by and*
19 *through Tanis v. County of San Diego*, 576 F.Supp.3d 721, 735 (S.D. Cal. 2021) citing *Ferm v.*
20 *United State Treasury (In re Crawford)*, 194 F.3d 954, 959 (9th Cir. 1999).

21 90. On information and belief, the private information and data gathered by Color from
22 registering CAL FIRE employees, including Plaintiffs, during the registration and testing required
23 by Defendants, including Defendants Tyler and Ortega acting in their official and representative
24 capacity, includes a tissue sample and, on information and belief, date of birth, social security
25 number, address, and health information including pregnancy status and whether the employee or
26 a member of the employee’s family was exposed to COVID-19.

27 91. Disclosure of the types of sensitive details gathered from registering CAL FIRE
28 employees to Color is harmful in and of itself, even without additional adverse consequences.

1 However, the potential for further disclosure to a wide range of recipients, control of which is
 2 entirely outside the reach of the individuals about whom the details pertain, vastly increases the
 3 possibility of misuse of the information in ways that are predictable (employment discrimination
 4 and harassment, for example) as well as unpredictable.

5 92. On information and belief, Defendants' (including Defendants Tyler and Ortega)
 6 coercive conduct has caused Color to disclose, or have the means and ability to disclose,
 7 registering CAL FIRE employees', including Plaintiffs', private information to third parties for
 8 reasons other than legitimate testing purposes. This conduct has also caused registering CAL FIRE
 9 employees', including Plaintiffs', information to be retained by Color and third parties without
 10 adequate safeguard from further disclosure.

11 93. Color's testing properly allows Defendants to learn whether their employees have
 12 tested positive or negative for COVID-19. However, receipt, use, and/or divulging of, or ability to
 13 divulge, the additional private information disgorged under protest by registering CAL FIRE
 14 employees is unnecessary and lacks any compelling justification.

15 94. Plaintiffs and other similarly situated employees have been irreparably harmed by
 16 the violation by Defendants Tyler and Ortega of the Fourth Amendment of the U.S. Constitution,
 17 the extent of which is unknown at this time.

18 95. WHEREFORE, Plaintiffs pray for the relief set forth in Paragraphs 1 – 12 in the
 19 Prayer section below.

20 **SIXTH CAUSE OF ACTION**

21 **VIOLATION OF THE FIFTH AMENDMENT OF THE** 22 **U.S. CONSTITUTION**

23 **Against Defendants Joe Tyler and Eraina Ortega and Does 1-10**

24 96. Plaintiffs hereby incorporate by reference Paragraphs 1 – 95 hereof as though fully
 25 set forth herein.

26 97. Individuals have a right of privacy under the Due Process Clause of the Fifth and
 27 Fourteenth Amendments, particularly with respect to the protection of personal medical
 28 information and records. *See Yin v. State of California*, 95 F.3d 864, 870 – 871 (9th Cir. 1996).

1 The Ninth Circuit analyzes the violation of such rights under the rubric of the Fourth Amendment.
 2 *See id. See also, Norman-Bloodshaw v. Lawrence Berkeley Laboratory*, 125 F.3d 1260, 1269 (9th
 3 Cir. 1998) (applying Fourth Amendment analysis to assess violations of right to privacy regarding
 4 medical tests while acknowledging that such tests implicated rights protected under Fifth and
 5 Fourteenth Amendments).

6 98. For the reasons discussed in Paragraphs 88 – 94 above, Defendants Tyler and
 7 Ortega, in their official and representative capacities as directors of CAL FIRE and CalHR,
 8 respectively, have violated and are violating Plaintiffs’ right to privacy under the Fifth
 9 Amendment.

10 99. Plaintiffs and other similarly situated employees have been irreparably harmed by
 11 Defendants’ violation of the Fifth Amendment of the U.S. Constitution, the extent of which is
 12 unknown at this time.

13 100. WHEREFORE, Plaintiffs pray for the relief set forth in Paragraphs 1 – 12 in the
 14 Prayer section below.

15 **SEVENTH CAUSE OF ACTION**
 16 **VIOLATION OF THE FOURTEENTH AMENDMENT OF THE**
 17 **U.S. CONSTITUTION**

18 **Against Defendants Joe Tyler and Eraina Ortega and Does 1-10**

19 101. Plaintiffs hereby incorporate by reference Paragraphs 1 – 100 hereof as though
 20 fully set forth herein.

21 102. The Constitutional right to privacy extends to protecting medical information from
 22 disclosure. *See Norman-Bloodshaw*, 125 F.3d at 1269. The Ninth Circuit analyzes violations of the
 23 right to privacy under the Fourteenth Amendment under the rubric of the Fourth Amendment. *See*
 24 *Yin*, 95 F.3d at 870 – 871; *Norman-Bloodshaw*, 125 F.3d at 1269.

25 103. For the reasons discussed in Paragraphs 88 – 94 above, Defendants Tyler and
 26 Ortega, in their official and representative capacities as directors of CAL FIRE and CalHR,
 27 respectively, have violated and are violating Plaintiffs’ right to privacy under the Fourteenth
 28 Amendment.

1 5. For injunctive relief ordering Defendants to take all steps necessary to require
2 Color to immediately cease disclosing CAL FIRE employees' confidential information to third
3 parties and/or otherwise using this information beyond those actions that are necessary to
4 complete testing employees' samples for COVID-19;

5 6. For injunctive relief ordering Defendants to take all steps necessary to require
6 Color to identify any CAL FIRE employees' confidential information that has been disseminated
7 to third parties and the parties that received this information;

8 7. For injunctive relief ordering Defendants to take all steps necessary to require
9 Color to use all best efforts to cause any third parties to which it disclosed CAL FIRE employees'
10 confidential information, to return such information to Color or destroy it;

11 8. For injunctive relief ordering Defendants to take all steps necessary to require
12 Color to destroy any CAL FIRE employees' confidential information in its possession once
13 COVID-19 testing and reporting the results of such testing to CAL FIRE and the applicable
14 employees have been completed;

15 9. For injunctive relief ordering Defendants to take all steps necessary to rescind the
16 Color-CDPH Agreement if Color and/or any relevant third parties fail to comply with Defendants'
17 demands or efforts to perform the acts set forth in Paragraphs 5 through 8 of this Prayer.

18 10. For reasonable attorneys' fees pursuant to Code of Civil Procedure section 1021.5,
19 Labor Code section 2698 et seq., or any other lawful basis;

20 11. For costs of suit herein incurred; and

21 12. For such other and further relief as the Court may deem proper.

22 Dated: October 17, 2022

MESSING ADAM & JASMINE LLP

23
24 By /s/ Gary M. Messing

25 Gary M. Messing

26 Wendi J. Berkowitz

27 Matthew Taylor

28 Attorneys for Plaintiffs